The Mid-Atlantic Regional Council for Small Business Education and Advocacy

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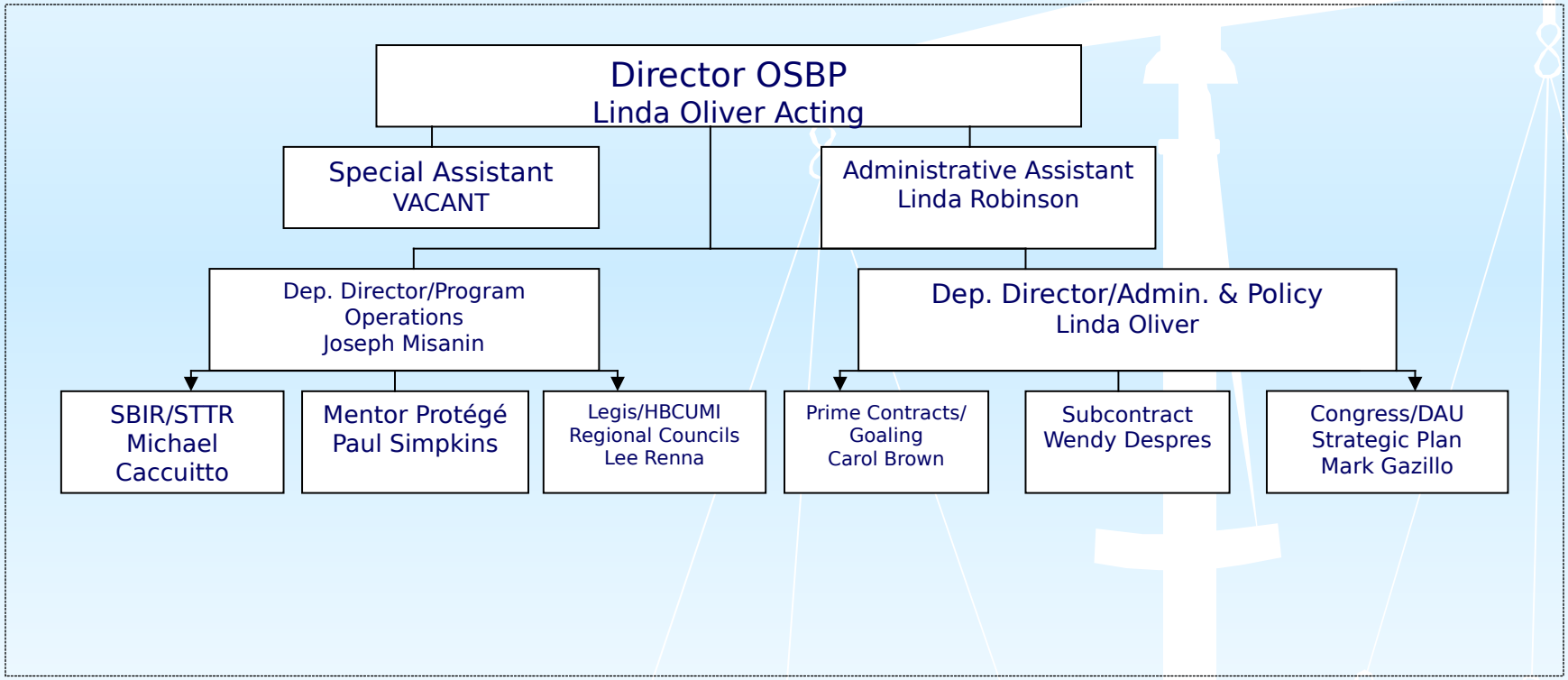
Outline

- OSBP Organizational Chart
- Court Cases
- GAO Decisions
- Regional Council Status Next Step

OSBP Functional and Staffing Chart



National Defense Authorization Act

Public Law 110-417

- National Defense Authorization Act for Fiscal Year 2009, aka, the Duncan Hunter NDAA, was signed into law Tuesday, October 14, 2008

Legislation

SBIR/STTR

- The Small Business Innovation Research Program (SBIR) was extended by S. 3029 through March 20, 2009
- The Small Business Technology Transfer (STTR) Program will expire September 30, 2009

Court Cases

DynaLantic Corporation v. United States Department of Defense, et al., United States District Court For The District of Columbia

Statutory Background…

- The Due Process Clause of the Fifth Amendment and the Equal Protection Clause of the Fourteenth Amendment prohibit federal and state governments from engaging in certain forms of discriminatory behavior
- Before the Government can employ race-based [remedial] action it must have a “compelling interest”

Court Cases

DynaLantic Corporation v. United States Department of Defense, et al., United States District Court For The District of Columbia

Statutory Background con't…

- The remedy used to address the compelling interest must be narrowly tailored
- Both the compelling interest and the narrow tailoring must withstand "strict scrutiny"
- The Government has the burden to prove that its racial classification passes strict scrutiny

Court Cases

DynaLantic Corporation v. United States Department of Defense, et al., United States District Court For The District of Columbia

Case Background…

- The Navy awarded contract for mobile flight simulators under 8(a) program
- DynaLantic, a small business, previously designed/manufactured the simulator, was unable to compete because it was not an 8(a) firm
- DynaLantic filed suit in the U.S. District Court

Court Cases

DynaLantic Corporation v. United States Department of Defense, et al., United States District Court For the District of Columbia

At Issue:

- DoD's utilization of the 8(a) program as set forth in 10 U.S.C. § 2323 (however, not the 8(a) program as a whole)

Court Cases

DynaLantic Corporation v. United States Department of Defense, et al., United States District Court For the District of Columbia

The Outcome:

- None yet. The Court instructed the parties to resubmit their motions for summary judgment
- On November 30, 2007, the parties completed additional briefings
- Decision by the Court on the resubmitted motions for summary judgment pending.

Court Case

Rothe Development Corporation v.
The Department of Defense and Department of the Air Force
United States Court of Appeals for the Federal Circuit
(Rothe 2008)

Background…

- The Air Force, through application of the SDB Price Evaluation Adjustment (PEA) awarded a contract to an Asian-American owned firm.
- Rothe Development Corporation, a non-minority firm owned by a Caucasian woman, would have been the lowest bidder.
- On 1998 Rothe filed its first complaint against DoD/Air Force.

Court Case

Rothe Development Corporation v. The Department of Defense and Department of the Air Force

United States Court of Appeals for the Federal Circuit

(Rothe 2008)

At Issue:

- The constitutionality of 10 USC 2323

Court Case

Rothe Development Corporation v. The Department of Defense and Department of the Air Force
United States Court of Appeals for the Federal Circuit
(Rothe 2008)

The Outcome:

- The U.S. Court of Appeals declares 10 USC 2323 to be unconstitutional;
- It has enjoined its application; and
- It has remanded the case back to the United States District Court for the Western District of Texas.

Court Case

Rothe Development Corporation v. The Department of Defense and Department of the Air Force

United States Court of Appeals for the Federal Circuit

(Rothe 2008)

The Ramifications…?

- DoD suspended the use of SDB set-asides in 1995 upon advice of the Department of Justice;
- Since DoD has met its 5% goal for SDB's since 1993, the PEA has been suspended.

Court Case

Rothe Development Corporation v. The Department of Defense and Department of the Air Force

United States Court of Appeals for the Federal Circuit

(Rothe 2008)

The Ramifications…!

- DoD's HBCU/MI Program is at risk
- Authority to use set-asides under DFARS 226.370, which is predicated on 10 USC 2323, will disappear

Court Case

Rothe Development Corporation v. The Department of Defense and Department of the Air Force
United States Court of Appeals for the Federal Circuit
(Rothe 2008)

Recommendation:

- All pending actions relying on 10 USC 2323 as its sole authority should be put on hold.
- Always consult with your attorney before taking any action.
- Contact OSBP

GAO Decisions

Delex Systems, Inc.
GAO B-400403

- Background…
  - The Naval Air Systems Command (NAVAIR) awarded its training systems IDIQ contract (TSC) II to a total of eight firms, four small businesses and four large businesses
  - The contracts contained a provision that reserved NAVAIR's right to restrict competition of individual delivery orders to small business
  - On June 11, 2008 the CO amended each TSC II contract to incorporate FAR 52.219.23, "Post-Award Small Business Program Representation“
  - Only two of the 8 contract holders re-certified as small businesses.

GAO Decisions

Delex Systems, Inc.
GAO B-400403

- Background con’t…
  - The CO subsequently amended a task order proposal request from restricted [to small business] to unrestricted, concluding she could not meet the Rule of Two
  - Delex, one of the remaining TSC II small business contract holders, protested NAVAIR's decision

GAO Decisions

Delex Systems, Inc.
GAO B-400403

- Background con't...
  - Delex complained that NAVAIR erred in its conclusions and that it should have restricted competition to small business
  - The Navy contends that FAR 19.502-2(b), the "Rule of Two" does not apply to the issuance of task orders under ID/IQ contracts

GAO Decisions

Delex Systems, Inc.
GAO B-400403

- GAO Decision:
  - GAO noted that the case intertwines three statutes:
    - The Small Business Act;
    - The Competition in Contracting Act (CICA); and
    - The Federal Acquisition Streamlining Act (FASA)

GAO Decisions

Delex Systems, Inc.
GAO B-400403

- GAO Decision con't…
  - CICA and FASA, which were enacted subsequent to the Small Business Act, were expressly written to *harmonize* with existing statues i.e., the Small Business Act
  - Nothing in CICA or FASA explicitly exempts them from the requirements of the Rule of Two
  - Though FAR Part 16 states "the competition requirements in FAR Part 6 and the policies in Subpart 15.3 do not apply to the ordering process
  - GAO's interpretation is that those peculiar requirements do not apply to task/delivery orders
  - Which *does not* mean that the requirements of the Small Business Act itself do not apply

GAO Decisions

Delex Systems, Inc.

GAO B-400403

- GAO Decision con't…
  - **Finally, the GAO concluded that the Rule of Two, which applies because, for purposes of this analysis, those orders are properly viewed as "acquisitions".**

GAO Decisions

Delex Systems, Inc.
GAO B-400403

- Status:
  - Awaiting DoD Office of Legal Council decision to concur/non concur with the GAO's opinion(s)
  - The DAR Council will then approach the FAR Council to discuss FAR revision in light of the DoD/GAO' s decision
  - OSBP will participate in ad hoc team to develop the FAR case and appropriate FAR language
    - *Note: GSA states that GAO's ruling does not apply to orders issued under Federal Supply Schedules.*

GAO Decisions

International Program Group, Inc. (IPG)
GAO B-400278; B-400308

- Background…
  - On May 21, 2008, the contracting agency for Camp Pendleton received a requisition for additional training, valued at $159,780
  - Due to the short time constraints the CO considered an SDVOSB set-aside
  - After market research the CO determined only one SDVOSB was interested in competing for the contract. He therefore issued a sole-source award to that SDVOSB
  - IPG, a HUBZone small business, was an incumbent contractor providing support services to Camp Pendleton. IPG filed a protest.

GAO Decisions

International Program Group, Inc. (IPG)
GAO B-400278; B-400308

- Background…
  - A second requisition for training ($250,000) was received by the same contracting agency
  - After considering an 8(a), HUBZone, and SDVOSB set-asides, the CO chose an SDVOSB set-aside, since her agency's parent activity had made the least progress in obtaining its SDVOSB goal
  - IPG filed a second protest against this decision
  - IPG argued that the agency was required to set aside both procurements for HUBZones

GAO Decisions

International Program Group, Inc. (IPG)
GAO B-400278; B-400308

- GAO's Decision:
  - GAO sustained IPG's protest

GAO Decisions

International Program Group, Inc. (IPG)
GAO B-400278; B-400308

- Rationale:
  - Section 31 (2) (B) of the Small Business Act (HUBZone) states that "a contract opportunity **shall** be awarded pursuant to this section on the basis of competition restricted to qualified HUBZone small business concerns if the contracting officer has a reasonable expectation that not less than 2 qualified HUBZone small business concerns will submit offers and that the award can be made at a fair market price...“
  - Section 36(b) of the Small Business Act (SDVOSB) states that "...a contracting officer **may** award contracts on the basis of competition restricted to small business concerns owned and controlled by service-disabled veterans if the contracting officer has a reasonable expectation that not less than two small business concerns owned and controlled by service-disabled veterans will submit offers and that the award can be made at a fair market price"
  - The use of the term "shall" at § 31 (2) (B) of the Small Business Act commands in unequivocal terms that a contract opportunity be designated as a HUBZone set-aside; whereas the "may" used at § 36(b) of the Small Business Act's is a discretionary term

GAO Decisions

International Program Group, Inc. (IPG)
GAO B-400278; B-400308

- Status:
  - FAR Case 2006-034 has been put on hold indefinitely

Regional Councils

1. Status of the Washington District of Columbia (D.C.) Regional Council
   Memo has been issued.

2. Strengthening the communication link between the DoD Office
   of Small Business Programs (OSBP) and the Regional Councils

3. Recognition of the value and need for the Regional Councils within DoD
   hierarchy
4. Regional Council Membership (maintaining and increasing)

5. Voting Rights and who may hold office in the Regional Councils.

Questions?

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